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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-8491

AAFCO HEATING AND AIR CONDITIONING CO.,
Petitioner,

vs.

NORTHWEST PUBLICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT AND THE INDIANA COURT OF APPEALS, THIRD DIVISION

F. DAVID J. ALBANESE
1119 Fourth and Walnut Building
Cincinnati, Ohio 45202
513-721-2552

H. FRED HOEFLE
400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
513-241-1268

WILLIAM K. BENNETT
68 Lafayette Bank and Trust Building
Lafayette, Indiana 47901

Attorneys for Petitioner

COURT INDEX PRESS, INC. — 819 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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vs.

NORTHWEST PUBLICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT AND THE INDIANA COURT OF APPEALS, THIRD DIVISION

Petitioner, Aafco Heating and Air Conditioning Company, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of Indiana, Third District, which opinion was filed December 30, 1974, and the decision of the Indiana Supreme Court refusing to review such decision of the Indiana Court of Appeals, which refusal was entered September 19, 1975.

OPINION BELOW

The opinion of the Court of Appeals of Indiana, reported at 321 NE 2d 580, together with the decision of the Indiana Supreme Court not to review the decision of the Court of Appeals, are set forth herein as appendices A and B respectively.

JURISDICTION

The decision of the Indiana Supreme Court denying review was entered on September 19, 1975. This petition is timely filed and jurisdiction is envoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Whether the permissive rule that States may define for themselves the standard of liability for a publisher of defamatory falsehoods injurious to a private individual is satisfied by an opinion of two of three judges of an intermediate state appellate court where such court has no legislative or policy making power under the constitution of that state.

2. Whether a State may constitutionally adopt as a standard for imposing liability for a publisher of defamatory falsehoods injurious to a private individual the standards set forth in *New York Times Company* v. *Sullivan,* 376 U.S. 254 (1964) which case purported to set standards for liabilities for defaming public figures.

3. Whether the fact that a newspaper publisher who publicizes the defamatory allegation that a heating contractor's faulty installation of a furnace was found by the fire department to be responsible for a fire in which children perished, when in actuality the fire department found the cause of the fire to be an overloaded electrical circuit not connected in any way to the installation of the furnace, which finding was known to the publisher, sets forth a cause of action against which the Constitutional First Amendment privilege is not a defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I of the United States Constitution provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

Amendment XIV of the United States Constitution provides in pertinent part:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws."

Article I, Section IX of the Indiana Constitution provides:

> "No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write or print freely upon any subject whatever; but for the abuse of that right, every person shall be responsible."

Article III, Section I of the Indiana Constitution provides:

> "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Article IV, Section I of the Indiana Constitution provides, in pertinent part, as follows:

> "The Legislative authority of the State shall be vested

in the General Assembly, . . . and no law shall be enacted, except by bill."

STATEMENT OF THE CASE

The within action originated when Petitioner, a heating and air conditioning contractor, located in Lake County, Indiana, filed an action against Northwest Publications, Inc., Respondents, publisher of the Gary, Indiana Post-Tribune in the City of Gary, Indiana for damages for libel in that the Respondent published a series of newspaper articles commencing November 10, 1970 and ending April 9, 1971, which conveyed to the public the falsehood that Petitioner overloaded an electric circuit as a result of an improperly installed furnace, and was to blame for the death of two children in a fire.

In 1970 Petitioner had installed a furnace on the property and had connected the furnace to an electrical circuit on which no other items were connected. On October 21, 1970, some time after the furnace had been installed, the fire occurred at the home and two children perished.

The Gary Bureau of Fire Investgiation made a report which stated, in part, as follows:

> "Origin and cause of fire: The most heavily burned area was in the living room and around the stairway leading to attic. Make-shift extension cord running from dining room through wall under stairway to living room for television hook-up, then from the same outlet another extension cord extend to upstair attic for lights as this attic was being used for sleeping quarters."

The extension cord to the attic near the stairwell was nowhere near the furnace or any of the wiring connected thereto. Petitioner's sales manager, Mr. Willis, had been

on vacation, and due an oversight resulting from his absence, a permit for the installation of the furnace was not applied for until the day of the fire, October 22, 1970. The permit was refused because the fire had already occurred, and the licensing board of the building department of the City of Gary later held hearings concerning two jobs done by Aafco without a permit, this job and one other.

Respondent admits publishing the story complained of, and also admitted that it intended to blame petitioner in the public's eyes for the fire and resulting deaths. The stories complained of were published November 10 and 18, December 2 and 18, 1970 and January 8 and 13, February 7 and 10, and April 1 and 9, 1971.

During discovery proceedings, one of the respondent's reporters, Knightly, stated that he knew of no witness who claimed the defective furnace installation caused the fire; that he was going to spread Aafco (Petitioner) all over the Gary papers, "really get them"; that he claimed to have been told by someone at the fire department that the house did not have sufficient voltage and that the furnace was attached by means of an extension cord, which was patently untrue. One David Allen, author of four or five of the stories forming the basis of the litigation, interviewed no one and read no reports as to the cause of the fire, and knew of no one who challenged petitioner's ability in the field of furnace installation. One Faye Donovan, author of one of the articles, actually went to the fire prevention bureau and reviewed the written report, took notes from that report, and recalled seeing no documents indicating that the furnace was in any way related to the fire. One James Williams wrote another story in January, 1972 and admitted not checking into the background of the fire.

Petitioner had demanded a retraction and did so in writing. Petitioner then and now denies any responsi-

bility for the fire and so imparted this denial to the respondent.

Terrence O'Rourke, Managing Editor of the newspaper, the Post, had full access to and a copy of the fire department report, had no knowledge of anyone who claimed or any claim that the furnace was attached to an extension cord, claimed that the final written report of the fire prevention bureau said that a heavy duty blower on the furnace was the probable cause of the overloaded fire, O'Rourke candidly stated that the newspaper intended to convey to the public the idea that petitioner overloaded a circuit with the furnace and it was to blame for the fire.

REASONS FOR GRANTING THE WRIT

1. The private individual who has set forth a cause of action for libel is denied the due process of law where an intermediate state appellate court without any authority to do so adopts in a two to one decision the qualified constitutional privilege announced in New York Times v. Sullivan, supra, as the standard in that state defining the qualified constitutional privilege which inures to a publisher of defamatory allegations.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indiana Court of Appeals, in its opinion below, stated:

> "Our review examines the development of privilege as a defense and its First Amendment dimensions. *Gertz* v. *Robert Welch, Inc.* (1974), —- U.S. —-, 94 S. Ct. 2997, gives the states the option of defining the standards of constitutional privilege for 'private individuals'. Our opinion rejects the simple negligence standard suggested in *Gertz* v. *Robert Welch, Inc., supra. We redefine the Indiana libel standard for the private individual.* We conclude that a *qualified constitutional privilege* does apply to a private individual in Indiana and that there was no genuine issue of material fact upon the question of privilege. We affirm the trial court's summary judgment." (Emphasis added.)

The decision of the Court of Appeals was the decision of one of the several appellate districts of the Court of Appeals of Indiana, and was the opinion of two of three judges of that panel. Judge Staton wrote the opinion, which was joined in by Judge Buchanan. Judge Garrard wrote a dissenting opinion and dissented from the judgment. Thus, two judges out of many judges of the Court of Appeals of Indiana, in their own words, "redefined the Indiana libel standard for the private individual." The Indiana Supreme Court, in rejecting review, tacitly approved the adoption of the *New York Times* standard by that intermediate appellate court.

Under Article III, Section I of the Indiana Constitution, the powers of the government are divided into three separate departments, Legislative, Executive, including Administrative, and Judicial. That constitutional provision further provides that "no person, charged with official duties under one of these departments, shall exercise any of the functions of another, . . .". Article IV, Section I of the Indiana Constitution provides that the Legislative

authority of the State is vested in the General Assembly, and "no law shall be enacted, except by bill."

In *Scott* v. *Scott,* 150 NE 2d, 740, the Indiana Supreme Court held that it was not the function of the Indiana Supreme Court to consider matters of policy, which is for the legislature to determine, and within which constitutional bounds the Supreme Court of Indiana is not at liberty to interfere. The Indiana Court of Appeals, in *Prudential Insurance Company of America* v. *Lancaster,* 219 NE 2d 607, held that the judiciary must leave to the legislature and executive departments of the government the tasks of determining public policy. This finding was echoed more recently by the Indiana Supreme Court in *Bissell Carpet Sweeper Company* v. *Shane Company,* 143 NE 2d 415.

In *Bissell,* the question involved price fixing and the Indiana Supreme Court said there, at page 418, that "it is within the power of the General Assembly to change the common law rule in Indiana, and to accept fair trade price fixing by contracts between buyers and sellers from the various provisions of the restraint of trade acts of this State." In many other areas, the courts have held that the courts may not invade the legislative function as set forth in the Indiana Constitution. See, e.g., *Wright* v. *Steers,* 179 NE 2d 721; *Indiana State Employees Association, Inc.* v. *Negley,* 501 F. 2d 1239; *Miskunas* v. *Union Carbide Corporation,* 399 F. 2d 847, Cert. Den. 393 U.S. 1066; *Chemel* v. *General Motors Corp.,* 261 F. Supp. 134, affirmed 384 F. 2d 802.

It is clear from the cited authorities that the Indiana legislature determines the public policy of the State; *Bissell Carpet Sweeper Company* v. *Shane Company, supra.* Separation of powers has been firmly established by the In-

diana Constitution and by subsequent court decision. In *Gertz* v. *Robert Welch, Inc., supra,* this court held that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." In that case, this court also recognized "the strong and legitimate state interest in compensating private individuals from injury to reputation."

In its opinion below, the Indiana Court of Appeals stated:

> "Our opinion rejects the simple negligence standards suggested in *Gertz* v. *Robert Welch, Inc., supra.* We redefine the Indiana libel standard for the private individual. We conclude that a qualified constitutional privilege does apply to a private individual in Indiana . . . ."

Clearly, the determination by a state of what state constitutional privilege, if any, applies where a private individual is defamed by a publisher is a matter of public policy for the determination of state authorities. However, it is not the place of the Indiana Court of Appeals to determine public policy but that of the Indiana Legislature. In presuming to set any standard, the Indiana Court of Appeals exceeded its constitutional authority and thereby acted contrary to Indiana law.

Even though this court, in *Gertz,* did permit the states to define for themselves "the appropriate standard of liability" the Indiana Court of Appeals went further and determined that a qualified constitutional privilege did apply. Thus, the Indiana Court of Appeals not only in its opinion determined public policy for the state in excess of its authority, but it interpreted the United States Con-

stitution in a manner adverse to the interpretation of this Court in *Gertz,* in creating the privilege where this Court has said that none exists.

The Indiana Supreme Court, while not affirming or adopting the usurpation of legislative authority by the Third District Court of Appeals in this case, nonetheless let stand an opinion in which both the United States and Indiana Constitutions were violated, and in which an intermediate Court of Appeals greatly exceeded its authority in determining public policy matters. If the standard adopted by the Indiana Court of Appeals is to be adopted, that adoption should be accomplished by the Indiana legislature, or by the Indiana Supreme Court in interpreting its Constitution. Further, if any "qualified constitutional privilege" does apply to a private individual in Indiana, under the United States Constitution, only Congress and the people in amending the Constitution, or the Supreme Court of the United States in interpreting the Federal Constitution, have the power to accomplish this end.

2. The Constitution of the United States does not permit a state to provide to a publisher of defamatory falsehoods the defense of a federal constitutional privilege which has not been found to exist by this Court.

Petitioner will not here recite the development of the constitutional privilege which in the past has been held to protect publishers of defamatory falsehood from liability to those defamed, depending on whether the victim was a public official, a public figure, a private individual involved in a matter of substantial public interest, or a private individual not involved in a matter of great public interest.

It should suffice to state that the current standard is that permitted under the most recent decision of *Gertz* v. *Robert Welch, Inc., supra,* permitting the states to define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual, but which does not permit a state, as the Indiana Court of Appeals has sought to do, to interpret the Federal Constitution differently than this court has so interpreted it; and to permit, as was done here, a publisher of a defamatory falsehood to set forth as a defense the "qualified constitutional privilege" first set forth by this Court in *New York Times Co.* v. *Sullivan, supra,* where the victim of the defamation is a private individual rather than a public figure, a public official, or a private citizen involved in a public event.

While this Court did find that the states could define their own standards of liability under this situation, it did limit the states to permit only recovery of compensatory damages when liability is not based upon a showing of knowledge of falsity or reckless disregard for the truth. This court did not say that a state may interpret the First Amendment to the United States Constitution as it sees fit, and adopt the rigid standard set forth in *New York Times* to all situations, regardless of the situation in which the victim of the defamation finds himself.

The ruling in *Gertz* is in need of clarification, because this Court did not state what it meant by "standards of liability," and the Indiana Court of Appeals has considered that permissive rule as permitting it to "play" with the United States Constitution. This Court should state whether by "standards of liability" it means that a state may decide for itself whether or not to permit recovery by private individuals for defamatory falsehoods negligently published, or intentionally published without malice,

or by some other standard. This Court did limit and restrict the states from using the strict liability standard, and did restrict the states from imposing punitive damages, at least where no constitutional malice had been shown.

We feel that this court meant, in *Gertz*, that the states might decide among the aforementioned bases upon which liability could be predicated, and did not mean, as the Indiana Court of Appeals apparently believes, that the states were free to impose whatever privilege or defenses they might wish in the name of the United States Constitution. It is important that this court clarify its ruling in *Gertz* so that it is clear in which area the states do have the latitude granted by that decision.

3. The complaint of the petitioner in the trial court fully sets forth a cause of action which would withstand a Motion for Summary Judgment under the decision of this court in Gertz v. Robert Welch, Inc., supra, and this case is particularly apt for review by this court to further delineate the extent to which a state may define for itself the appropriate standard of liability, and whether or not a constitutional privilege under the First Amendment may be attached by a state in a manner different from and inconsistent with the application of constitutional privilege by this court.

In the Indiana Court of Appeals, Judge Garrard, dissenting, succinctly set forth the problem:

> ". . . *Gertz* holds that in the case of the nonpublic official/figure, the First Amendment privilege protects

> only against liability without fault and (in the absence of constitutional malice) limits damages to actual injury.
>
> Accordingly, when the court says 'the states may define for themselves the appropriate standard of liability', it is merely iterating the absence of constitutional limitation. . . .
>
> Instead Indiana case law establishes that in the absence of First Amendment privilege, malice in the connotation of *New York Times* is not a necessary element to recovery."

While Judge Garrard agreed with the majority that "the materials presented to the trial court for consideration upon the Motion for Summary Judgment were insufficient to establish a genuine issue of material fact" upon the defense issue of constitutional malice as defined in *New York Times* v. *Sullivan, supra,* he emphasized that Indiana law provided, barring a change of the public policy of that state, that malice within the connotation of the *New York Times* was not a necessary prerequisite to recovery of damages. Judge Garrard felt that Indiana law permitted recovery by a private citizen where a defamatory untruth is shown to be a matter of fault of the publisher, although the fault results from his negligence rather than his constitutional malice, *Wabash Printing & Publishing Co.* v. *Crumrine,* 21 NE 904; *Gabe* v. *McGinnis,* 68 Ind. 538; *Hotel and Restaurant Employees* v. *Zurzolo,* 233 NE 2d 784. Judge Garrard concluded that the materials presented to the trial court *were* sufficient to disclose the existence of a disputed genuine issue of material fact, whether the respondent negligently libeled a private citizen causing actual injury, and stated that the matter should be tried on the merits.

This Court stated that the states may not permit recovery of punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." While petitioner feels that constitutional malice was shown below, at least to the extent that it should survive a Motion for Summary Judgment, that he nonetheless should be permitted to maintain his action based on the negligent libel published by respondent. The Indiana Court of Appeals went far beyond the mandate of this court, which we feel somewhat relaxed the burden of the private individual defamed publicly. The Indiana Court of Appeals misinterpreted and misused the permissive ruling in *Gertz,* not to similarly relax state standards, as we believe this Court contemplated, but to strengthen the power of publishers and others who defame private individuals to continue their excesses unimpaired by any legally enforceable standard of responsibility. Such a situation cannot be permitted to continue.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

F. DAVID J. ALBANESE
1119 Fourth and Walnut Building
Cincinnati, Ohio 45202
513-721-2552

H. FRED HOEFLE
400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
513-241-1268

WILLIAM K. BENNETT
68 Lafayette Bank and Trust Building
Lafayette, Indiana 47901

Attorneys for Petitioner

APPENDIX A

ATTORNEYS FOR APPELLEE:

GERALD K. HREBEC
FRED M. CUPPY
Thomas, Burke, Dyerly & Cuppy
1016 Gary National Bank Bldg.
Gary, Indiana 46402

ATTORNEYS FOR APPELLANT:

WILLIAM K. BENNETT
Bennett, Boehning & Poynter
68 Lafayette Bank & Trust Building
Lafayette, Indiana 47901

DAVID J. ALBANESE
Albanese, Hoehne & Coffaro
1119 4th & Walnut Building
Cincinnati, Ohio 45202

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THIRD DISTRICT

No. 3-1073 A 133

AAFCO HEATING AND AIR
CONDITIONING COMPANY,
Appellant,

v.

NORTHWEST PUBLICATIONS, INC.
Appellee.

APPEAL FROM THE JASPER CIRCUIT COURT
Michael S. Kanne, Judge

(Filed December 30, 1974)

STATON, J.

The Gary Post Tribune published a series of ten articles concerning an electrical fire at the home of Mrs. Matilda Collins which caused the death of her two small grandchildren. Aafco Heating and Air Conditioning Company had installed a furnace in the home of Mrs. Collins three weeks before the fire on October 21, 1970. The articles reported that no permit had been obtained by Aafco before making the installation and that one fire official observed that "a heavy duty blower on the furnace may have caused an overload in the electrical service" which ignited the fire. A formal complaint against Aafco was filed with the Gary Contractors' Licensing Board which resulted in Aafco's suspension.

Aafco filed a libel complaint for $250,000.00 in actual damages and $500,000.00 in punitive damages. Northwest Publications, Inc., publishers of the Gary Post Tribune, filed its answer which relied on the defensive grounds of truth and qualified constitutional privilege. Later, Northwest's motion for summary judgment was sustained by the trial court. Aafco's appeal from this summary judgment presents the following questions for our review:

1. Does the qualified constitutional privilege announced in *New York Times* v. *Sullivan* and *Rosenbloom* v. *Metromedia, Inc.* apply to an alleged libel of a private individual in Indiana when the published statements relate to an issue of general and public concern?

2. Is there a genuine issue of material fact upon the question of privilege?

Our review examines the development of privilege as a defense and its First Amendment dimensions. *Gertz* v. *Robert Welch, Inc.* (1974), — U.S. —, 94 S.Ct. 2997, 41 L.Ed.2d 789, gives the states the option of defining the standards of constitutional privilege for "private individuals." Our opinion rejects the simple negligence standard suggested in *Gertz* v. *Robert Welch, Inc., supra.* We redefine the Indiana libel standard for the private individual. We conclude that a qualified constitutional privilege does apply to a private individual in Indiana and that there was no genuine issue of material fact upon the question of privilege. We affirm the trial court's summary judgment.

I.

Privilege

Until a decade ago, privilege had no First Amendment dimensions. The common law development of defamation had been left to the several states. *Times Film Corp.* v. *City of Chicago* (1961), 365 U.S. 43; *Beauharnais* v. *Illinois* (1952), 343 U.S. 250; *Chaplinsky* v. *New Hampshire* (1941), 315 U.S. 568. For example, a state legislator in Indiana is immune from liability even if he publishes defamatory material with an improper motive and with knowledge of its falsity (absolute privilege). IND CONST., Art. 4, § 8. A similar absolute privilege attaches to judges, attorneys, parties and witnesses in connection with a judicial proceeding. *See, e.g., Griffith* v. *Slinkard* (1896), 146 Ind. 117, 44 N.E. 1001. The dissemination of news by the communications media has traditionally been safe-

guarded by two qualified or conditional privileges which may be pleaded as affirmative defenses in a libel action:

1. The privilege of "fair comment" (limited to opinions on public officials and their conduct — not applicable to private individuals or newsworthy events) and
2. The privilege attached to the reporting of public proceedings.

See Henderson v. *Evansville Press, Inc.* (1957), 127 Ind. App. 592, 142 N.E.2d 920; 18 I.L.E. *Libel & Slander* § 61, at 474-75. *See generally* Note, *Fair Comment,* 62 HARV. L. REV. 1207 (1949).

In most states, the law of defamation regarding privileged communications follows a similar pattern. RESTATEMENT OF TORTS §§ 585-92 (1938). But, prior to the landmark decision in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254, qualified privileges for the protection of the mass media were limited by numerous restrictions and were often narrowly construed. While there would appear to be no Indiana authority to explicate the scope of these privileges, the weight of authority traditionally recognized only statements of opinion as privileged; false statements of fact were never privileged. *See Post Publishing Co.* v. *Hallam* (6th Cir. 1893), 59 F.2d 530; Noel, *Defamation of Public Officers and Candidates,* 49 COLUM. L. REV. 875 (1949). Even in cases where the privilege was applicable, the publisher-defendant could suffer the loss of his defense of privilege if the libeled plaintiff could adduce evidence of either negligence or ill will. RESTATEMENT OF TORTS § 606 (c) (1938). Moreover, many courts limited the privilege of fair comment to the discussion of public events or the conduct of public officials; there was no privilege accorded the media to comment on

matters merely because they were newsworthy. *See, e.g., Broking* v. *Phoenix Newspapers* (1953), 76 Ariz. 334, 264 P.2d 413; W. PROSSER, THE LAW OF TORTS 814-15 (4th ed. 1971).

The common law of qualified privilege for media expression was transplanted into the realm of emerging First Amendment doctrine in the landmark case of *New York Times Co.* v. *Sullivan, supra.* The basic starting point of the *New York Times* opinion was that the publisher discussing public questions is engaged in an activity protected by the First Amendment. Confined to its narrowest formulation, this decision held that the First and Fourteenth Amendments forbade "a public official from recovering damages of a defamatory falsehood relating to his official conduct unless he proved that the statement was made with 'actual malice' — that is with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. In a subsequent decision, *Curtis Publishing Co.* v. *Butts* (1967), 388 U.S. 130, the Court extended the *New York Times* privilege to media comments on matters of public interest concerning "public figures." While the meaning of the term "public official" has caused the Court little difficulty,[1] the question of who is or who is not a "public figure" has not been fully resolved by the Court. In *Curtis Publishing Co.* v. *Butts, supra,* Mr. Justice Harlan spoke of the "public figure" as commanding "a substantial amount of independent public interest" at the time of publication. 388 U.S. at 154. Several state

[1] A test was developed for ascertaining the identity of a "public official" within the *New York Times* standard:

> "Those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of public and governmental affairs." *Rosenblatt* v. *Baer* (1966), 383 U.S. 75, 85.

court cases interpreting the federal standard have found a wide variety of persons to be "public figures" within the *Butts* formulation.[2]

The *New York Times* malice standard has undergone extensive refinement. It was initially determined that "reckless disregard of the truth" meant false statements made with a high degree of awareness of their probable falsity. *Garrison* v. *Louisiana* (1964), 379 U.S. 64, 74. Later cases emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and "actual malice" in the traditional sense of ill will. *Beckley* v. *Newspaper Corp.* (1967), 389 U.S. 81; *see also Greenbelt Cooperative Publishing Assoc.* v. *Bresler* (1970), 398 U.S. 6. In a later decision, *St. Amant* v. *Thompson* (1968), 390 U.S. 727, the Court attempted to resolve any remaining uncertainty as to the proper content of the malice standard. The *St. Amant* Court held that reckless conduct could not be measured by whether a reasonably prudent man would have published the alleged libel or would have investigated before publishing; "actual malice" evidence must show "that the defendant in fact entertained serious doubts as to the truth of his publication." 390 U.S. at 731.

Rosenbloom v. *Metromedia, Inc.* (1971), 403 U.S. 29, increased the degree of First Amendment protection af-

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[2] *See, e.g., Tilton* v. *Cowles Publishing Co.* (1969), 76 Wash. 2d 707, 459 P.2d 8, *cert. denied* 399 U.S. 927 (1970) (policeman and fireman running for election to a municipal health and safety board); *Arber* v. *Stahlin* (1968), 10 Mich.App. 181, 159 N.W.2d 154, *cert. denied*, 397 U.S. 924 (1970) (republican party volunteer workers and precinct delegates); *Rose* v. *Koch* (1967), 278 Minn. 235, 154 N.W.2d 409 (a university professor who was both a noted author and a former state legislator at the time of publication); *Grayson* v. *Curtis Publishing Co.* (1967), 72 Wash.2d 999, 436 P.2d 756 (head basketball coach at University of Washington).

forded the media in previous cases by shifting the focus of the *New York Times* privilege from the person's status to the newsworthiness of the statement published. The *Rosenbloom* plurality opinion held that when a "matter of public or general concern" is published, a private individual may recover for injury caused by defamatory falsehood only if he can prove the publication was made with knowledge that it was false or with reckless disregard of whether it was false — a sweeping extension of the *New York Times* privilege.

Mr. Justice Harlan's *Rosenbloom* dissent urged that a different standard of constitutional privilege should apply to publisher-defendants in libel actions instituted by private individuals. The Harlan formulation adopted a "reasonable man" or simple negligence standard as the proper measure of publisher-defendant liability for otherwise libelous communications. Moreover, as a counterbalancing protective device, this approach limited publisher-defendant liability for negligent defamation to provable "actual damage." Any recovery by private individuals for "presumed" or general damage to reputation required proof of "malice" under the *New York Times* privilege standard. 403 U.S. 67-76.

A recent First Amendment decision by the United States Supreme Court, *Gertz* v. *Robert Welch, Inc., supra,* has added a new dimension to the accommodation between the First Amendment and common law defamation. A second and more expansive approach is taken to protect the reputation of the private individual, which is similar to the approach advocated in Justice Harlan's dissent in *Rosenbloom*. Status of the private individual is re-emphasized while "newsworthiness" is de-emphasized. A simple negligence standard is proposed, but liability without fault or libel *per se* cannot become a part of the negligence stand-

ard. Damages under this standard are limited to "actual damages."[3] Presumed or general damages to reputation would continue to be contingent upon proof of malice under the New York Times privilege standard. Finally, the states are given the option to define their own standard of constitutional privilege for the defamation of private individuals, but the standard must not provide for liability without fault. The definitional option left to the states is either a *Gertz* or *Rosenbloom* conceptualized privilege. We choose the latter.

II.

Indiana Standard

We first assume that the publication of matters which are of general or public concern is an activity protected by Article 1, Section 9 of the Indiana Constitution.[4] Secondly, we assume that factual error is inevitable in the course of free debate and that some latitude for untrue or misleading expression must be accorded to the communications media; otherwise, free, robust debate worthy of constitutional protection would be deterred and self-censorship would be imposed in the fact of unpopular controversy. We seek an accommodation between two societal interests: (1) freedom of speech and of the press as it relates to a well-informed community, and (2) protection of the private individual's reputation when it is involved in matters of general and public concern.

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[3] See Justice Harlan's dissenting opinion in *Rosenbloom, supra.*

[4] Article 1, Section 9 of the Indiana Constitution provides:

> "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely on any subject whatever: but for the abuse of that right, every person shall be responsible."

Indiana's constitutional protection of freedom of expression requires that the interchange of ideas upon all matters of "general or public interest" be unimpaired. In order to fulfill its historic function, freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama* (1940), 310 U.S. 88, 102. Emerging principles of free expression "have disclosed the artificiality, in terms of the public's interest, of a simple distinction between 'public' and 'private' individuals or institutions." *Rosenbloom* v. *Metromedia, Inc., supra,* 403 U.S. at 33. Even the *New York Times* majority opinion placed primary emphasis on our "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open." 376 U.S. at 270-71 (emphasis added). Comments in other United States Supreme Court decisions reiterate the basic value judgment that constitutional guarantees of free speech and press must extend to all matters which affect our efforts to live and work together in a free society.

We adopt a standard that requires the private individual who brings a libel action involving an event of general or public interest to prove that the demamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false.

III.

General or Public Concern

In *Time, Inc.* v. *Hill* (1967), 385 U.S. 374, the Court had "no doubt that the . . . opening of a new play linked to an actual incident, is a matter of public interest." 385 U.S. at 388. In *Curtis Publishing Co.* v. *Butts* (1967), 388

U.S. 130, the Court held that an alleged "fix" of a football game was a public issue. Thus, it seems clear that constitutional protection for speech and press was not intended to be limited to matters bearing only on issues of official conduct or the activities of pre-ordained or *de facto* "public figures." Rather, we must conclude that Indiana's constitutional mandate of freedom of the press was designed to advance "truth, science, morality and the arts in general as well as responsible government." *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 147 (Harlan, J. concurring opinion).

When a general or public interest is recognized, it becomes unimportant in terms of ascertaining whether the public has a legitimate interest in an issue or event, whether the person involved in a famous, large-scale distributor of heating and air-conditioning equipment or a "private" businessman operating a similar enterprise in a small community. As Justice Brennan stated in his *Rosenbloom* plurality opinion:

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, affect and significance of the conduct, not the participant's prior anonymity or notoriety." 403 U.S. at 33.

The key analytic determinant in the application of constitutional protections for speech and press in libel actions by "private" individuals must be whether the communication involved concerns an issue of general or public interest without regard to whether the individual is famous or anonymous.

IV.

Public v. Private Reputations

A simple negligence standard would require that the private individual prove only that the publisher failed to exercise "reasonable care." This standard assumes that society has a greater interest in protecting "private" reputation than safeguarding the community standing and repute of "public officials" and "public figures." Drawing a distinction between "public" and "private" figures makes no sense in terms of our constitutional guarantees of free speech and press. The *New York Times* privilege standard was applied to defamatory falsehood concerning a public official or public figure to give effect to the primary function of our system of free expression — the encouragement of discussion and commentary on public issues. The media was not accorded a special constitutional privilege merely because society has a lesser interest in the protection and vindication of the reputations of public officials and public figures. The reputations of public figures and public officials merit the same quantum of protection as those of private citizens.

Any argument that the private individual, unlike the public figure, does not have access to the media to counter defamatory material focuses on a disparity which is present only in a limited number of situations. Only rarely will a public official or public figure have attained sufficient prominence to command media attention which will provide a meaningful chance to rebut and defend against defamatory falsehood. Even in the rare case where an adequate opportunity for reply is afforded, it is unlikely that the rebuttal statements will receive the same degree of public attention as the published defamation.[5] It would appear that the

[5] In his *Rosenbloom* plurality opinion, Justice Brennan countered this "access" argument with the statement:

proper solution for any lack of access on the part of all citizens, whether "public" or "private" is not the expansion of the right to sue for defamation, but rather the passage of state laws creating a limited right to respond to defamatory falsehoods.[6] But, alternative remedial measures are, of course, matters for legislative consideration.

Public officials and public figures are as deserving of redress for injury to their reputation as private citizens. The argument that public officials and public figures assume the risk of defamation by voluntarily placing themselves in the public eye is a misconception of the role which every citizen is expected to play in a system of participatory self-government. Every citizen, as a necessary part of living in society, must assume the risk of media comment when he becomes involved, whether voluntarily or involuntarily, in a matter of general or public interest. It has long been recognized that "exposure of the self to others in varying degrees is a concomitant of life in a civilized community." *Time, Inc.* v. *Hill, supra,* 385 U.S. at 388.[7]

> "Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary or has left the position that put him in the public eye, see *Rosenblatt* v. *Baer, supra,* the argument loses all of its force." 403 U.S. at 35.

[6] The United States Supreme Court's recent decision in *Miami Herald Publishing Co.* v. *Tornillo* (1974), —— U.S. ——, 94 S.Ct. 2831, 41 L.Ed.2d 730, which held Florida's right-to-reply statute constitutionally invalid, does not foreclose legislative creation of a limited right of action to compel retraction of libelous statements. *See generally* Note, *Vindication of the Reputation of a Public Official,* 80 HARV. L. REV. 1973, 1939-47 (1969). Indiana's present "retraction" statute merely requires the prospective libel litigant to serve a written demand for retraction on the offending publisher as a condition precedent to the initiation of judicial proceedings, and limits recovery for "good faith" defamatory falsehood to "actual damages" if a retraction is published within the statutory time period. I.C. 1971, § 34-4-51-1 and 2.

[7] An examination of the values arguably protected by the law of defamation clarifies the individual interests implicated by our decision.

V.

Self-Censorship

The United States Supreme Court recognized in *New York Times Co.* v. *Sullivan, supra,* that a rule requiring the media to guarantee the truth of its news reporting would lead to self-censorship. Publishers, fearful of being unable to prove the truth of their statements, would avoid the publication of controversial articles. We refuse to adopt a rule that would allow private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care. Such a rule would promote self-censorship by causing publishers to "steer far wider of the unlawful zone." *Speiser* v. *Randall* (1958), 357 U.S. 515, 526. The uncertainty attendant upon a reasonable care standard would charge the press with "the untolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Time, Inc.* v. *Hill, supra,* 385 U.S. at

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Libel law protects at least two distinct interests of the individual: First, his desire to preserve certain aspects of his life from unwarranted intrusion; and second, a desire to preserve his reputation and standing in the community. *See, e.g., Rosenblatt* v. *Baer* (1966), 383 U.S. 75, 92. But, the individual's interest in preventing unreasonable intrusion into the private aspects of his life is not implicated in the category of cases under consideration since the media privilege we have created extends only to discussion of matters of general or public concern. Our formulation recognizes that "some aspects of the lives of even the most public men fall outside the area of matters of public or general concern." *Rosenbloom* v. *Metromedia, Inc., supra,* 403 U.S. at 48. The argument that "public" figures and officials have voluntarily exposed all aspects of their personality to public view while private individuals have kept their lives free of unwanted publicity ignores the dynamic potential of the emerging law of privacy and its elevation to the level of a "penumbral" constitutional protection. *See Roe* v. *Wade* (1973), 410 U.S. 113; *Griswold* v. *Connecticutt* (1965), 381 U.S. 479. *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 543-57 (1970).

389. A publisher's fear of guessing wrong about juror assessment of the reasonableness of the news gathering procedures he employs would inevitably deter "protected" speech. Furthermore, the standard of proof employed in libel actions heightens the risk of self-censorship inherent in a "reasonable care" standard of media privilege. Speaking for the *Rosenbloom* plurality, Justice Brennan observed:

> "Moreover, we ordinarily decide civil litigation by the preponderance of the evidence. In the normal civil suit where this standard is employed, 'we view it as more serious in general for there to be an erroneous verdict in the defendant's favor.' In re Winship, 397 U.S. 358, 371 (1970). In libel cases, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." 403 U.S. at 50.

A limit on the recovery of private citizens in libel actions to "actual damages" would not operate to alleviate the uncertainties attendant upon the reasonable care standard adopted by the *Gertz* majority.[8] The *Gertz* Court's

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[8] Indiana law reflects the historic rule that publication in written form of statements defamatory *per se* — words which, on their face and without regard to extrinsic facts, tend to injure the reputation of another — subjects a publisher to liability although no harm to reputation is actually proved. *Indianapolis Newspapers, Inc.* v. *Fields* (1970), 254 Ind. 219, 255-56 N.E.2d 651, 667-68, *cert. denied* 400 U.S. 930 (1970); *Gibson* v. *Kincaid* (1966), 140 Ind. App. 186, 201, 221 N.E.2d 834, 843. Under the "presumed damage" rule, juries may award substantial sums as compensation for supposed injury to reputation without any proof that such harm was actually suffered. The uncontrolled discretion of juries in libel actions to award damages

broad definition of "actual" injury includes "impairment of reputation and community standing," as well as "personal humiliation and mental anguish and suffering." —— U.S. at ——, 94 S.Ct. at 3012, 41 L.Ed.2d at 811. Such an expansive definition of "actual damage" will not materially reduce the risk of capricious jury verdict nor would it deter a jury from punishing the publisher of unpopular ideas.

The threat of media self-censorship arising from the uncertainties incident to a reasonable care standard of media privilege, is largely avoided by the *New York Times* standard of reckless or knowing falsity. While the vagueness of the original standard, phrased in terms of "reckless disregard for the truth," caused some concern about self-censorship,[9] the formulation of the "malice" test in *St. Amant* v. *Thompson* (1968), 390 U.S. 727, 731 should provide trial courts with relatively clear guidance. The *St. Amant* Court held that reckless conduct was not measured by whether a reasonably prudent man would have published or would have investigated before publishing; rather, the evidence must show that the defendant in fact entertained serious doubt as to the truth of the statement. 390 U.S. at 731. Thus, publisher knowledge of serious factual inconsistencies – facts which negate or materially contradict the impression conveyed by the published state-

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in the absence of demonstrable injury necessarily compounds the danger to free expression posed by the vagueness of the reasonable care standard.

[9] See the concurring opinion of Justice Black, joined by Justice Douglas in *New York Times* v. *Sullivan* (1964), 376 U.S. at 293; the concurring opinion of Justice Douglas, joined by Justice Black, in *Garrison* v. *Louisiana* (1964), 379 U.S. 64, 80-83. *See also,* Note, *Free Speech and Defamation of Public Persons: The Expanding Doctrine of New York Times Co.* v. *Sullivan,* 52 CORNELL L. REV. 419, 429-32 (1967).

ments to some significant extent – would be highly probative evidence of awareness of probable falsity. The publisher's failure to employ any reliable investigatory methods or lack of any effort to independently verify disputed or questionable factual assertions would also be relevant to the issue of reckless disregard for the falsity of published statements. *See Indianapolis Newspapers, Inc.* v. *Fields* (1970), 254 Ind. 219, 244-51, 259 N.E.2d 651, 666-68 (DeBruler, J. separate opinion). Further guidance as to the proper content of the *New York Times* privilege standard can be gained by examining the many federal and state cases that have focused on the question of constitutional "malice."[10] Note, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis,* 70 MICH. L. REV. 1547, 1560-62 and notes 94-96 (1972).

VI.

Test

This Court believes that the subject matter test adopted in this opinion – an event or topic of general or public interest – will provide both the media and the courts with sufficient guidance as to those matters which are appropriate for public comment and thus accorded the protection of constitutional privilege.

The general or public interest test for applying the "malice" privilege standard will involve the trial courts

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[10] Many of these cases have been decided favorably to the defendant by summary judgment or directed verdict. *See, e.g., Treutler* v. *Meredith Corp.* (8th Cir. 1972), 455 F.2d 255; *Gospel Spreading Church* v. *Johnson Publishing Co.* (D.C. Cir. 1971), 454 F.2d 1050; *Time, Inc.* v. *Johnston* (4th Cir. 1971), 448 F.2d 378; *Miller* v. *News Syndicate Co.* (2nd Cir. 1971), 445 F.2d 356; *Dacey* v. *Florida Bar, Inc.* (5th Cir. 1970), 427 F.2d 1292.

in the task of deciding what information is or is not relevant to the promotion of free expression. While it is true that this task will not always be easy, the courts have traditionally assumed the role of ultimate arbiters of disputes concerning conflicting constitutional policies. The contention that the judiciary will prove inadequate for such a role would be more persuasive were it not for the sizable body of federal and state cases that have employed the concept of a matter of general or public interest to reach decisions in libel cases involving private citizens.[11] The public interest is necessarily broad; recent decisions dealing with a panoply of topics and events, ranging from organized crime to the quality of food served in a particular restaurant, will assist trial courts in defining the proper scope of the public interest test.[12]

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[11] *See, e.g., Treutler* v. *Meredith Corp.* (8th Cir. 1972), 455 F.2d 255 (announcement of candidacy for municipal office); *Time, Inc.* v. *Johnston* (4th Cir. 1971), 448 F.2d 378 (story of how obscure professional athlete was forced to quit playing basketball ten years before article was published); *Gospel Spreading Church* v. *Johnson Publishing Co.* (D.C. Cir. 1971), 454 F.2d 1050 (size of the estate left by a church elder); *Washington* v. *New York News, Inc.* (1971), 37 App.Div.2d 557, 322 N.Y.S.2d 896 (attendance by bishop at nightclub performance of a choir singer of his church).

[12] *See, e.g., Cantrell* v. *Forest City Publishing Co.* (6th Cir. 1973), 484 F.2d 150 (article concerning family of victim of bridge disaster); *Davis* v. *National Broadcasting Co.* (E.D. La. 1970), 320 F.Supp. 1070, aff'd. 447 F.2d 981 (5th Cir. 1971) (report about a person who was involuntarily involved in events relating to the assassination of President Kennedy); *Belli* v. *Curtis Publishing Co.* (1972), 25 Cal.3d 384, 102 Cal.Rptr. 122 (article concerning attorney with national reputation); *Time, Inc.* v. *Firestone* (Fla. 1972), 254 So.2d 386 (divorce of prominent businessman held not a matter of public concern); *Harnish* v. *Herald-Mail Co., Inc.* (1972), 264 Md. 326, 286 A.2d 146 (article concerning substandard apartment building owned by city official); *Twenty-Five East Fortieth Street Restaurant Corp.* v. *Forbes, Inc.* (1971), 37 App. Div.2d 546, 322 N.Y.S.2d 408 (quality of food served by restaurant).

VII.

Summary Judgment

Northwest's motion for summary judgment was granted by the trial court. Aafco contends that a genuine material issue of fact existed and that the trial court's judgment should be reversed. Our review under the Indiana Standard is whether a genuine issue of material fact existed upon the defense of privilege asserted in Northwest's answer. Stated in the context of the privilege: Were there any facts before the trial court which would place in issue Northwest's knowledge that the articles were false or that the articles were published with reckless disregard of whether they were false. We need not concern ourselves with the question of general or public interest of the event since this preliminary consideration has been conceded.

A genuine issue of material fact is one that is dispositive of the litigation. If there are no facts presented by the interrogatories, depositions and affidavits which would place the defense of privilege in issue, the trial court's judgment should be affirmed. *Doe* v. *Barnett* (1969), 145 Ind. App. 542, 251 N.E.2d 688.

The Gary Fire Department report of the fire is as follows:

> "Origin and cause of fire: The most heavily burned area was in living room and around stairway leading to attic. Makeshift extension cords running from dining room through wall under stairway to living room for television hook-up, then from the same outlet another extension cord extended to upstair attic for light as this attic was being used for sleeping quarters."

Aafco contends that this brief, routine report eliminates any possible comment on the furnace blower overloading

the electrical circuit. Aafco further contends that the factual variance between the report and the published articles raises a clear inference of a reckless disregard for the truth in Northwest's investigatory and reporting techniques.

Aafco's challenge reflects a disagreement with Northwest's choice of inferences. The report coupled with one fire official's assessment suggests several inferences. One choice of inferences may suggest a conclusion much different from a second choice of inferences or a third choice of inferences, but these choices do not constitute falsity or irresponsible reporting. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 155.

The depositions and affidavits established that the articles were wholly based upon information obtained from city officials and from the testimony of participants in the license revocation proceedings conducted by the Gary Contractors' Licensing Board. At most, the circumstances surrounding the publication of the articles indicates that Northwest's reporters may have failed to examine the Fire Department report or possibly misinterpreted the report's conclusion as to the cause of the Collins' fire. But, the evidence discloses no recurrent lack of investigative effort to verify factual statements sufficient to support a reasonable inference of reckless falsity. It must be remembered that:

> "Reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be evidence to support the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson* (1968), 390 U.S. 727, 731.

The policy at the foundation of the *New York Times* privilege standard is the promotion of free expression. The publisher who maintains a standard of care designed to avoid knowing or reckless falsehood must be accorded sufficient assurance that those factual errors which nonetheless occur will not expose him to indeterminate liability. If a genuine issue of material fact concerning a publisher's reckless disregard for the truth could be raised by a mere showing that the published speech was factually incorrect, the constitutional policy of avoiding media self-censorship would be seriously eroded.

Assuming that the impression conveyed by the articles was false, we find no evidence in the record that Northwest had any knowledge of the impression's falsity, nor do we find any evidence that Northwest entertained serious doubts of the impression's falsity. Therefore, the trial court's summary judgment should be and the same hereby is affirmed.

BUCHANAN, J. CONCURS

GARRARD, J. DISSENTS WITH OPINION

DISSENTING OPINION

(Filed December 30, 1974)

GARRARD, J.

I agree that in the case before us, the materials presented to the trial court for consideration upon the motion for summary judgment were insufficient to establish a genuine issue of material fact upon the defense issue of constitutional malice as defined in *New York Times* v. *Sullivan* (1964), 376 U.S. 254. Furthermore, at the time the trial court rendered its decision, it was guided only by the plurality opinion of *Rosenbloom* v. *Metromedia, Inc.* (1971), 403 U.S. 29, which indicated that application of the *New York Times* standard would be proper.

However, on June 25, 1974, the Supreme Court issued its decision in *Gertz* v. *Welch* (1974), — U.S. —, 94 S. Ct. 2997, and by a majority of the Court redefined the applicability of First Amendment privilege as a defense in certain libel actions. It therefore becomes necessary to determine whether Aafco has presented a viable claim on the facts presented under the modification announced in *Gertz*.

In *New York Times* the Court determined that a libelous communication by the news media was privileged unless accompanied by what has come to be known as "constitutional malice". Such malice exists only where the publisher of the libel has actual knowledge of the falsity of the statement or publishes with reckless disregard of probable falsity.

Subsequent decisions have further defined what conduct suffices to establish malice through recklessness. See, e.g. *Garrison* v. *Louisiana* (1964), 379 U.S. 64; *St. Amant* v. *Thompson* (1968), 390 U.S. 727.

Here, however, we are concerned with what I conceive to be a more basic application of the *New York Times* concept. The essence of *New York Times* is the balance between the right of individual members of the public to protection against false and defamatory accusations and the right of the public, in general, to knowledge of the events and affairs that shape their lives.[1] In attempting to achieve this balance, the Court has, and I believe properly so, recognized that if the essential value of an informed public is to be preserved, those responsible for providing that information must be accorded some margin for error. The chilling effect of providing no "breathing space" upon the dissemination of vital information which is either true, but difficult to verify under the burden of proof imposed at trial, or substantially true but containing minor inaccuracies, is well discussed in the federal cases.

Yet it is to be remembered that consideration of the privilege necessarily postulates a defamatory falsehood. As Mr. Justice White, writing for the majority in *St. Amant,* stated:

> "It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity."
>
> * * *
>
> "Neither lies nor false communications serve the First Amendment, and no one suggests their desirability or further proliferation. But to insure the

[1] The First Amendment also has as its purpose protection of the individual's right to express his opinion. I, however, find those applications beyond the purview of those here considered. See, *Curtis Publishing Co.* v. *Butts, infra.*

> ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." 390 U.S. at 731-32.

Therefore, in broad measure, the public significance of the events at issue has a very real, if difficult to define, bearing on the public justification for sacrificing truth and private reputation. This was well recognized by the Court in *Gertz,* but was abandoned as the appropriate rule of law in favor of one providing more predictability.

In *New York Times* and *St. Amant* the Court determined that privilege based on the absence of constitutional malice was justified in reports concerning public officials. *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker* (1967), 388 U.S. 130, extended application of the standard to "public figures" because they "are nevertheless intimately involved in the resolution of important public questions, or, by reason of their fame, shape events in areas of concern to society at large." 388 U.S. 164.

Then in *Rosenbloom* v. *Metromedia, Inc., supra,* the Court found the necessity for "constitutional malice" if a mere "private citizen" was to recover for statements made in connection with events involving the discovery of allegedly obscene materials. Justices Burger, Brennan and Blackmun found the qualified privilege requiring application of the *New York Times* standard to be present in "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous". 403 U.S. 44. Mr. Justice White would have limited this extension to those private citizens involved in or affected by the official acts of public servants, which he felt should be reported in full detail.

In this context, the Court came to *Gertz* v. *Welch, supra.* Gertz was an attorney. A Chicago policeman was convicted of murder and Gertz was retained by the victim's family to represent them in civil litigation against the policeman. An article appearing in defendant's magazine alleged that the policeman's murder trial was part of a communist conspiracy, implied that Gertz (who had no role in the criminal case) had a criminal record, and asserted he was a communist-fronter. When Gertz sued, the court entered judgment *n.o.v.* for the defendant on the basis that there was no showing of the constitutional malice required under the *New York Times* standard.

The Supreme Court in reversing recognized the legitimate state interest in compensating injury to the reputation of private individuals who have been defamed and held that such interest was unduly abridged by the test proposed by the *Rosenbloom* plurality. The Court also anticipated the disadvantages of *ad hoc* determinations that would follow the quest to determine which events were of "public" or "general" interest.

Thus, in an effort at balancing once again the competing interests of the public, the Court, while affirming the "public official" and "public figure" standards previously announced, held that in the case of the non-public official/figure, the interest of protecting the redress for injury inflicted by defamatory falsehood outweighed the "breathing room" requirements necessary to full implementation of the First Amendment, *except* to the extent that the redress sought would permit recovery for more than compensation for actual injury,[2] or would impose

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[2] Presumed or punative damages are precluded. Actual injury injury includes impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering. *Gertz* v. *Welch,* slip opinion, p. 26.

liability without fault. In other words, *Gertz* holds that in the case of the non-public official/figure, the First Amendment privilege protects only against liability without fault and (in the absence of constitutional malice) limits damages to actual injury.

Accordingly, when the Court says "the states may define for themselves the appropriate standard of liability", it is merely iterating the absence of constitutional limitation.

In turning then to Indiana law, I find no merit in Judge Staton's ready assumption that Article 1, Section 9 of the Indiana Constitution provides a broader privilege in defense of libel than appears in the First Amendment. Any plain reading of Section 9 must dispell such a notion.

Instead, Indiana case law establishes that in the absence of First Amendment privilege, malice in the connotation of *New York Times* is not a necessary element to recovery. *Wabash Printing and Publishing Co.* v. *Crumrine* (1889), 123 Ind. 89, 21 N.E. 904; *Gabe* v. *McGinnis* (1879), 68 Ind. 538; *Hotel and Restaurant Employees, etc.* v. *Zurzolo* (1968), 142 Ind. App. 242, 233 N.E. 2d 784.

Furthermore, while I am very much in accord with preservation of the "breathing room" dimension necessary to a successful protection of the purposes of the First Amendment, I do not believe that it is emasculated by the recognition the *Gertz* majority gives to the competing interest in preserving from defamation one's reputation.

Where either a public official or a public figure is the subject of the report, the privilege exists in the absence of constitutional malice. When, however, the report concerns an otherwise anonymous, or mere "private" citizen, then liability for actual injury will be imposed for a

defamatory untruth upon a showing of fault, although that fault be based upon negligence.

While an *ad hoc* determination of whether a particular event is a matter of public interest might be more in keeping with the ultimate purposes of the First Amendment, I am forced to agree that the lack of predictability in that approach might well provide the chilling effect upon reporting which we seek to avoid.

The materials presented to the court below were sufficient to disclose the existence of a disputed genuine issue of material fact: whether appellee negligently libeled a mere private citizen causing actual injury. I therefore believe the summary judgment should be set aside in favor of a trial on the merits.

APPENDIX B

LETTERHEAD OF CLERK OF THE SUPREME COURT AND COURT OF APPEALS

Billie R. McCullough, Clerk
217 State House
Telephone 633-5200

No. 3-1073A133

Aafco Heating and Air Conditioning Co. v. *Northwest Publications, Inc.*

You are hereby notified that the Supreme Court has on this day Appellant's "Petition to Transfer" is hereby DENIED.

Givan, C. J. All Justices Concur, except Justice DeBruler who would vote for Oral Argument.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 19th day of September, 1975.

/s/ BILLIE R. McCULLOUGH
Clerk Supreme Court and
Court of Appeals